FILED
APR 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1459

In the Supreme Court of the United States

OCTOBER TERM, 1989

MICHAEL VINCENT LANESE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
J. DOUGLAS WILSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether the limitations placed on petitioner's cross-examination of a government witness violated the Confrontation Clause.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 890 F.2d 1284.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1989. A petition for rehearing was denied on January 17, 1990. Pet. App. 20a-21a. The petition for a writ of certiorari was filed on March 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted on one count of conspiracy to use, and one count of using, extortionate means to collect an extension of credit, in violation of 18 U.S.C. 894(a)(1). Petitioner was sentenced to 78

months' imprisonment, to be followed by a three-year term of supervised release. He was also fined $25,000. The court of appeals affirmed. Pet. App. 1a-19a.

1. The evidence at trial, the sufficiency of which is not in dispute, showed that petitioner and his co-defendants Thomas Romano and Joseph Iannucci conducted bookmaking operations in the Bridgeport, Connecticut, area. In November 1987, Eugene Golino, who had been a frequent bettor with the defendants' bookmaking operations, incurred gambling losses of more than $80,000 to petitioner and his co-defendants. On December 18, 1987, Golino met with Romano at a Bridgeport diner and gave him $5,000 in partial payment for the debt. Romano then telephoned petitioner, who arrived at the diner a few minutes later. Petitioner, who was carrying a handgun, forced Golino to sign a promissory note for $80,000, payable to petitioner. Pet. App. 4a-5a; Gov't C.A. Br. 5-6.

Shortly after that meeting, Golino began cooperating with the FBI. Over the next month, he recorded several conversations with Romano in which Romano said that Golino would be harmed or killed if he did not pay his debts. On January 29, 1988, Golino met with petitioner and Romano at a Bridgeport park. Petitioner grabbed Golino by the throat, pushed him against a fence, and threatened to kill Golino if he did not pay the money he owed on the gambling debt. Pet. App. 5a.

2. At trial, the government filed a motion in limine to bar the defense from cross-examining Golino regarding the circumstances surrounding Golino's 1982 arrest by Connecticut authorities for larceny by extortion. The government stated that the charges had been dismissed and that the records of the arrest had been erased pursuant to Connecticut law. The government argued that inquiry into the incident was barred by Federal Rules of Evidence 608(b) and 609. Pet. App. 25a-31a.

Defense counsel claimed that the incident was proper material for cross-examination. According to defense counsel, in 1982 Golino, through his father-in-law, had made loans at 100% interest to a man named Anthony Kicska. Defense counsel asserted that when Kicska could not repay the loans, Golino's father-in-law threatened Kicska in Golino's presence; Golino was purportedly amused by the threats. Pet. App. 34a-36a.

To clarify the facts regarding the incident, the district court had the parties conduct an extensive voir dire of Golino outside the presence of the jury. Golino testified that he had lent $5,000 to Kicska at the behest of his father-in-law, that his father-in-law had repaid him immediately, and that he had accompanied his father-in-law to see Kicska about the debt. Golino said he could not recall that Kicska was threatened. He also stated that he had paid Kicska $5,000 as a way of settling the criminal charges, and that the charges were then dropped. Pet. App. 6a, 36a-49a. After hearing Golino's testimony and argument by defense counsel and the government, the district court granted the government's motion in limine. Pet. App. 50a-55a.

3. The court of appeals rejected petitioner's contention that the curtailment of his cross-examination of Golino violated the Confrontation Clause.[1] Petitioner argued that the 1982 incident would have been relevant to show that Golino approached the FBI in the hope of obtaining restitution for his gambling losses; petitioner's theory was that

[1] The court similarly rejected co-defendant Romano's claim that cross-examination of Golino on the 1982 incident was necessary to allow the jury to assess Golino's credibility. The court stated that the jury had sufficient information to consider Golino's credibility in light of the testimony that Golino was in the federal witness protection program, had been paid by the government in exchange for his cooperation, and had been granted immunity from state or federal gambling prosecutions. Pet. App. 7a.

Golino would therefore have had a motive for exaggerating or fabricating petitioner's use of violence to attract the FBI's attention. The court of appeals found petitioner's theory of bias too strained, because it was "highly improbable" that Golino would have thought he could obtain restitution by cooperating with the authorities as Kicska apparently had done six years earlier. Pet. App. 7a. The court pointed out that the circumstances of the two events differed significantly, in that Kicska's debt was unrelated to illegal gambling, and that the prior dispute, unlike Golino's dispute with petitioner, involved relatives or acquaintances. The court also noted that petitioner's theory of bias was undercut by the fact that the threats of violence used against Golino in this case were corroborated by other evidence, including taped conversations. Accordingly, the court found no Confrontation Clause violation. Pet. App. 7a.[2]

ARGUMENT

Petitioner renews his contention (Pet. 6-18) that the district court violated the Sixth Amendment by refusing to permit cross-examination of Golino regarding the 1982 incident. He claims that cross-examination on that issue would have revealed Golino's bias or motive in favor of the government and would have undermined Golino's credibility. The court of appeals properly rejected that claim, and its fact-bound holding does not merit this Court's review.

In *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986), the Court held that a defendant's confrontation rights are

[2] The court of appeals also held that the district court did not err by denying petitioner's motion for severance, by admitting evidence of uncharged misconduct against petitioner's co-defendant, or by declining to instruct the jury on single versus multiple conspiracies. Pet. App. 8a-9a. The court of appeals, however, vacated petitioner's sentence and remanded the case for resentencing because the district court had not made findings to support the sentence. Pet. App. 16a-19a.

violated when he is denied all cross-examination regarding an event that "a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony." *Id.* at 679. The Court made clear, however, that the defendant's right to cross-examine is not absolute. The Court explained: "[T]rial judges retain considerable latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Ibid.* See also *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974).

This Court has thus recognized that not every claim of bias requires the district court to grant the defendant's request for unrestricted cross-examination; the line of cross-examination must at least be marginally relevant. See also *United States* v. *Williams*, 877 F.2d 516, 519 (7th Cir.) ("The Sixth Amendment * * * guarantees a defendant the opportunity for *effective*, not limitless, cross-examination."), cert. denied, 110 S. Ct. 180 (1989). The facts of the *Van Arsdall* case illustrate the point. In *Van Arsdall*, the defendant was disallowed from questioning a witness about the dismissal of criminal charges against him in exchange for his agreement to discuss a murder with the prosecutor. On those facts, the Court found a violation of the defendant's confrontation rights because the "cross-examination [was] designed to show a prototypical form of bias on the part of the witness." 475 U.S. at 680.[3]

Unlike the classic form of impeachment that was denied in *Van Arsdall*, the line of cross-examination that petitioner desired to pursue was properly found by the court of appeals to lack probative value on the issue of bias. Petitioner

[3] The Court went on to hold that the confrontation violation should be assessed under the harmless error standard of *Chapman* v. *California*, 386 U.S. 18 (1967). 475 U.S. at 680-684.

contends that Golino's 1982 involvement with Kicska, in which Kicska obtained restitution after complaining to the authorities about Golino and his father-in-law, somehow provided Golino with a motive to go to the FBI in the hope of obtaining relief from his gambling debts and gaining restitution from petitioner and his co-defendants.[4] As the court of appeals explained, however, that claim is "highly improbable" because the two situations differ so markedly in the relationship of the parties and the nature of the underlying transactions. From the sketchy and confusing facts elicited on voir dire, it appears that Golino and Kicska were related by marriage, and the loans between them did not stem from an illegal gambling scheme. In that context, it is no surprise that the dispute was resolved by a simple agreement to make restitution.

In contrast, Golino's relationship to petitioner was as a debtor resulting from illegal gambling activities; as the jury was told, one of the benefits for Golino of co-operating with the government was immunity from prosecution on gambling charges. Pet. App. 7a. Given Golino's own involve-

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[4] We note that petitioner has considerably shifted his grounds from those he urged in the district court for desiring to cross-examine Golino about the 1982 incident. In the district court, the defense urged that "the purpose of the inquiry * * * is this: that an essential element here is fear and the state of mind of this witness. * * * If the jury heard this evidence, they could make the decision whether or not this man feared anything from any of these defendants." Pet. App. 50a. When the district judge dismissed that contention, defense counsel moved on to the backup point that the crime of larceny was relevant to Golino's credibility. *Ibid.* In this Court (Pet. 15-16), as in the court of appeals (Pet. C.A. Br. 28-29), however, petitioner has made the quite different argument that Golino's prior experience with Kicska served as a sort of model for his cooperation with the government. Petitioner's current theory is that just as Kicska had obtained restitution by going to the police, Golino might have surmised that he could obtain restitution by going to the FBI.

ment in illegal activities, he could hardly have relied on Kicska's experience as a basis for expecting restitution. In short, because the jury could not reasonably have concluded that the 1982 incident would have motivated Golino to slant his testimony in the government's favor, cf. *Van Arsdall*, 475 U.S. at 679, there was no error in precluding cross-examination into it.[5]

Similarly, contrary to petitioner's suggestion (Pet. 16-18), cross-examination regarding the 1982 incident was not proper as a means of attacking Golino's credibility. Under Federal Rule of Evidence 608(b), a district court has discretion to permit cross-examination into specific instances of the conduct of a witness for the purpose of attacking the witness's credibility when the conduct is "probative of truthfulness or untruthfulness." Rule 608(b) "is intended to be restrictive" and does not permit inquiry into "[c]rimes primarily of force or intimidation." 3 J. Weinstein & M. Berger, *Weinstein's Evidence* § 608[05], at 608-46 to 608-49 (1988). In this case, Golino was charged with larceny by extortion, a crime of force and intimidation, not a crime of untruthfulness. Thus, the district court did not abuse its discretion by foreclosing cross-examination on the 1982 incident.

In any event, as the courts of appeals have recognized, the Confrontation Clause is not violated by the curtailment of cross-examination as long as the jury receives sufficient information to make a discriminating appraisal of the witness's motives for testifying for the government. See

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[5] Also casting doubt on the attenuated inferences that petitioner would draw from the 1982 incident is the fact that a far more obvious motive existed for Golino to cooperate with the government: the desire for protection from petitioner and his co-defendants and for immunity from prosecution. As the court of appeals noted, Pet. App. 7a, the threats of violence against Golino were amply established by the evidence.

United States v. *Blanco*, 861 F.2d 773, 781 (2d Cir. 1988) (finding no confrontation violation in denial of a line of cross-examination when "the jury had considerable information which enabled it to appraise Caban's credibility and possible motives for testifying falsely"), cert. denied, 109 S. Ct. 1139 (1989); *United States* v. *Klauer*, 856 F.2d 1147, 1149 (8th Cir. 1988) (finding no violation in denying cross-examination about the specifics of sentencing concessions by the prosecutor when the defendant had "more than ample opportunity to cross-examine Bradley as to his bias, motive and overall unreliability as a witness"); *United States* v. *Calle*, 822 F.2d 1016, 1020 (11th Cir. 1987) ("[A] trial judge may limit cross-examination without infringing the defendant's sixth amendment rights where '(1) the jury, through the cross-examination permitted, was exposed to facts sufficient for it to draw inferences relating to the reliability of the witness; and, (2) the cross-examination conducted by defense counsel enabled him to make a record from which he could argue why the witness might have been biased.' ").

In this case, the prosecutor elicited from Golino that he was in the federal witness protection program, that he had received money from the government through his participation in that program, and that he had agreed to testify at trial when he was accepted into the program. On cross-examination, Golino testified to the amount of money that he received from the federal government in payments and rent subsidies. Defense counsel also elicited that Golino was not subject to prosecution for his gambling offenses, that he was a compulsive gambler, that he deferred paying his legitimate creditors because of his gambling debts, and that while gambling he had owed money to the government for back taxes. Pet. App. 7a; Gov't C.A. Br. 18. These facts gave the jury an ample basis for assessing Golino's motives

for testifying, his credibility, and the possibility that he was biased in favor of the government.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
J. DOUGLAS WILSON
Attorney

APRIL 1990

U.S. GOVERNMENT PRINTING OFFICE 1990—262 203/00862